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In the Supreme Court of the United States

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., and EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., and ERNEST A. COPP,

Respondents.

Reply Brief in Support of Petition for Writ of Certiorari

RICHARD W. CURTIS
1801 Avenue of the Stars
Los Angeles, Calif. 90067
Telephone: (213) 553-3800
Attorney for Petitioners Gulf Oil Corporation and Industrial Asphalt, Inc.

DONALD C. SMALTZ
One Wilshire Bldg., Suite 2420
Los Angeles, Calif. 90017
Telephone: (213) 680-9770
Attorney for Petitioner Edgington Oil Company

MOSES LASKY
RICHARD HAAS
111 Sutter Street
San Francisco, Calif. 94104
Telephone: (415) 434-0900
Attorneys for Petitioner Union Oil Company of California

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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A petition should be determined upon the facts of the case presented, and the brief in opposition here possesses the capacity of deflecting attention from those facts.

1. The emphasis of that brief is upon "liquid asphalt." But the petition has nothing to do with "liquid asphalt"; it concerns "asphaltic concrete." Charges in the complaint of violations with respect to liquid asphalt were untouched by any order of the district court, were not involved in the proceedings before the Court of Appeals, and are not here. (See fn. 5, p. 7 of Petition). If respondents believe that there are facts about asphaltic concrete which enter into their case about liquid asphalt, the order of the district court left respondents free to assert them.

2. Respondents essentially admit that there is a conflict on the Robinson-Patman issue between the decision below and other circuits, particularly *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416 (5 Cir. 1972), and would distinguish that case as a "pleading case." (Br. 14). But, if that were true,[1] it would sharpen the conflict, for a pleading is construed strongly in favor of the pleader. Here there is a single Robinson-Patman issue—whether one making a commodity from materials obtained in the state of manufacture and selling it exclusively to others in that state is "in commerce" or whether its sales are "in commerce," merely because the buyer uses the commodity in making or repairing highways. *Rosemound* was precisely a case where "defendants sold sand and gravel [in Louisiana] to Louisiana contractors for the construction of highways." 469 F.2d at 419. Similar in holding no Robinson-Patman jurisdiction is *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, ... F.2d ....., 1973-2 Trade Cases ¶ 74,419 (7 Cir. 1973), where this Court denied certiorari (No. 73-671, January 14, 1974) despite the fact that petitioners there relied in their Supplemental and Reply Brief (at p. 3) on the very decision of the Ninth Circuit of which we here seek review. *Mayer Paving* and the decision below cannot both be correct. Certiorari having been denied in *Mayer Paving*, it should be granted here or the law will be left in confusion.[2]

3. *Rosemound* is also in direct conflict on the Sherman and Clayton Act issues. On the Sherman Act issue, respondents write about a "potential affect [sic]" on interstate commerce (e.g., at

1. Actually, in *Rosemound*, the court's opinion contains repeated reference to facts appearing in affidavits, interrogatory answers, and depositions, 469 F.2d at 417-18

2. Respondents' assertion (Br. 19) that *Federal Trade Commission v. Bunte Bros. Inc.*, 312 U.S. 349 (1941) was overruled in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1947) is demonstrated to be incorrect by reading the opinion in *Cement Institute* at pp. 695-6.

Br. 16) by which they mean speculation about actual effect. Had this case arisen on a motion directed to the pleadings, there might be room for speculation. But it did not so arise. It arose on a motion for summary judgment in which the district court directed respondents to take full discovery on the issue and then to submit whatever evidence they had. They submitted none. While a court does not find facts on a motion for summary judgment, it does determine whether there *is* a genuine issue of fact at all, and here the district court found that there was no genuine issue as to effect on interstate commerce. With that the Court of Appeals *did not* disagree.[3] On the contrary, it decided the case on the bare proposition that, *"as a matter of law,"* it is enough that asphaltic concrete is used by purchasers on roads which are segments of a highway which somewhere traverses state lines (see Petition, p. 8, and App., p. 10).

4. Respondents argue that "the decision of the court below can be sustained on two alternative grounds not considered in the opinion." (Br. 15). But the essential issue which calls for this Court's review is whether the basis on which the court below placed its decision is correct: whether the single fact that a building material is used by third party purchasers in construction of a road is enough to establish jurisdiction under the several antitrust acts which the complaint invoked.

The high function of certiorari jurisdiction is to settle important questions of law, not to decide cases on particular facts. The legal proposition announced by the court below being wrong, the writ should be granted. If it is claimed that other facts and other theories sustain respondents, the case can be remanded for determination below of those grounds.

3. Moreover, the district court's conclusion cannot be dismissed as a finding of fact, for the issue is jurisdiction, and that issue is determinable by a trial court even on affidavits. See fn. 11, p. 18 of Petition, and also *Rosen v. Rossmoor Corp.*, ... F.2d ...., 1973-2 Trade Cases ¶ 74,755 (9 Cir. Oct. 17, 1973).

CONCLUSION

Every street in every city and every road anywhere in the nation, unless it connects with no other, is part of an interstate network of highways. Is therefore the seller of anything used in a street or road "in commerce"? That is what the court below held. That holding, startling in itself, will launch still other law. It deserves review.

DATED: San Francisco, California, February 22, 1974.

Respectfully submitted,

MOSES LASKY
RICHARD HAAS
Attorneys for Petitioner Union Oil Company of California

RICHARD C. CURTIS
Attorney for Petitioners Gulf Oil Corporation and Industrial Asphalt, Inc.

DONALD C. SMALTZ
Attorney for Petitioner Edgington Oil Company